SUPREME COURT, U. S.

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MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

Attorneys for Sears, Roebuck and Co.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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Subsequent to the filing of the petition and reply in this case, the Solicitor General submitted his brief in the *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, No. 72-822, and this Court declined on June 11, 1973 to review *H. Kessler & Co.* v. *E.E.O.C.*, No. 72-1329. Both of these developments are significant in the present case.

1. The Solicitor General's brief in *Bannercraft* clearly recognizes, directly contrary to his assertion in the memorandum in opposition here (p. 7), that the questions presented in *Bannercraft* and the instant case are necessarily intertwined. That brief (p. 24, n. 21) in fact, acknowledges that the instant case raises "the same issue" as that presented in *Bannercraft*. The brief (p. 18, n. 17) further admits "the plaintiff's need for the documents in *Sears might have been greater* than that of the respondents" in *Bannercraft* (emphasis added). The memorandum in opposition as well as the Board in the proceedings below in this case, however, had theretofore taken a dramatically opposite view, i.e., that Sears' need, in contrast to that of Bannercraft, was not sufficient to warrant equitable relief. Similarly, the Solicitor General in *Bannercraft* argues that the injunction there was designed only "to aid the respondents . . . [and] not to further the public interest in disclosure of government information" (p. 22); that the injunction there would delay administrative proceedings and cause harm to the government (p. 23); and that the injunction there was improper because it was not clear that the documents sought were required to be made available under the Freedom of Information Act (pp. 25-6 and n. 25). In the present case, however, *none* of these considerations exist. The District Court found, and the Court of Appeals did not disturb, that the disclosure sought here would inure to the benefit of all members of the public (App. to Pet., p. A10, n. 1; p. A15), that the injunction issued would not unduly delay the administrative proceedings or harm the other parties thereto (App. to Pet., p. A9), and that it was probable that Sears was entitled to the controverted information under the Information Act (App. to Pet., pp. A4 and A10-15). Nevertheless, the Court below granted an injunction in *Bannercraft* and declined to do so in the present case. The issues

presented in this case, accordingly, are inseparable from those raised in *Bannercraft*,[1] and likely to recur, unless resolved, should this Court affirm the decision below in that case. The instant case warrants, therefore, as shown by the petition, resolution by this Court in conjunction with *Bannercraft*.

2. This Court's denial of the petition for writ of certiorari in *Kessler* was no doubt based, at least in part, on the Solicitor General's assertion that the right of the charging parties in that case to obtain investigative information, otherwise required to be confidential, from the Equal Employment Opportunity Commission was warranted because a contrary rule would "seriously impede" the Commission's conciliation process, i.e., "a party cannot be expected to agree to a settlement of his claims if information bearing on the claim is withheld from him." Memorandum in Opp. in No. 72-1329, pp. 2-3. Nevertheless, the Solicitor General has again taken a contrary view in this case: that analagous settlement and litigation efforts can be conducted by the Labor Board notwithstanding that charging parties before that Agency have been deprived of information to which they are entitled under the Information Act. This anomalous result, should the decision below be allowed to stand, is further reason for review by this Court.

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[1] The Solicitor General's brief in *Bannercraft* (pp. 27-35), premised on his position that cases arising before the Renegotiation Board and the National Labor Relations Board should be treated alike for purposes of the questions here involved (p. 18), also discusses at length, the *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, issue presented in the instant case. See Pet. for Cert., pp. 8-10. This further demonstrates the inseparability, and need for joint resolution of this case with *Bannercraft*.

The Petition, for the reasons set forth therein and in the reply, should be granted.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

Attorneys for Sears, Roebuck and Co.

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MICHAEL ROBAK, J

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GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
312-265-5352

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602
312-641-0200

ALAN RAYWID
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006
202-569-9750

Gunthorp-Warren Printing Company, Chicago • 346-1717

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner Sears Roebuck and Co. (hereafter "Sears") will herein advise the Court of related developments, subsequent to the filing of the petition for certiorari in the instant matter.

The case at bar arises from the Court of Appeals' reversal of a preliminary injunction enjoining the General Counsel of the National Labor Relations Board from proceeding with an unfair labor practice proceeding, which had been initiated by Sears, until Sears had an opportunity to evaluate certain public documents. The pending petition raises, in essence, two questions: *first*, the capacity of a district court to alleviate the irreparable violation of the public's right to the prompt production

of public documents under the Freedom of Information Act (5 U. S. C. § 552) by temporarily enjoining the commencement of an administrative proceeding; and *second*, the inter-relationship of the Information Act and the judicial review provisions of the various administrative agencies, especially Section 10(f) of the National Labor Relations Act (29 U. S. C. § 160(f)). Subsequent to the filing of the petition by Sears, the Court of Appeals for the District of Columbia Circuit affirmed, in a decision appended hereto, the District Court's holding, on the merits of the information request, that Sears was correct "on all points." Pet. App. A, p. A4. This holding should now dispel any doubts as to the clarity of General Counsel's violation of the Information Act. In such a case, where, as here, there is an absence of countervailing equities, the District Court should have been permitted to issue temporary relief to effectuate the Information Act's mandate "that production [of public material] be 'prompt.'" *National Cable Tele. Ass'n.* v. *F. C. C.*, 479 F. 2d 183, 188, n. 11 (D. C. Cir. 1973) Review by this Court, therefore, is necessary, as set forth in the petition, to validate the public rights granted by the Information Act.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
312-265-5352

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602
312-641-0200

ALAN RAYWID
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006
202-569-9750

APPENDIX.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1972

No. 72-1870

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act

vs.

NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the National Labor Relations Board, Appellants

Appeal from the United States District Court for the District of Columbia.

Civil Action No. 1571-71

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and ROBB, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is Ordered and Adjudged by this court that the judgment of the District Court appealed from herein is hereby affirmed on the basis of the opinion of District Judge Howard F. Corcoran, *see Sears, Roebuck & Co.* v. *NLRB*, D. D. C., 346 F. Supp. 751 (1972). *See also Grum-*

man Aircraft Engineering Corp. v. *Renegotiation Board,* . . . .
U. S. App. D. C. . . . ., ... F. 2d . . . . (No. 71-1730, de
cided July 3, 1973).

It is Further Ordered by this court that the stay ordered by
the District Court is hereby dissolved.

Per Curiam
For the Court:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk